

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

John D. West, on Behalf Of Himself and All
Other Persons Similarly Situated,
214 Woodlawn Road, Butler, Pennsylvania

Plaintiffs,

v.

AK Steel Corporation (Formerly ARMCO Inc.)
Retirement Accumulation Pension Plan, a part
of the AK Steel Corporation (Formerly
ARMCO Inc.) Noncontributory Pension Plan,
703 Curtis Street, Middletown, Ohio 45043

and

AK Steel Corporation Benefit Plans
Administrative Committee,
703 Curtis Street, Middletown, Ohio 45043

Defendants.

Case No.: C-1-02-0001

District Judge Sandra S. Beckwith

Magistrate Judge Jack Sherman, Jr.

**DEFENDANTS' UPDATE ON STATUS OF *LYONS III*
DECISION AND NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants submit this Notice to update the Court with respect to an incorrect suggestion made by plaintiff's counsel at oral argument relating to the decision in *Lyons v. Georgia Pacific Corp. Salaried Employees Ret. Plan*, 196 F. Supp. 2d 1260, 1273 (N.D. Ga. 2002) ("*Lyons III*"), and to file with the Clerk's office two items that were provided to the Court and opposing counsel at oral argument but that have not yet been filed formally.

Defendants' summary judgment memoranda cite the decision in *Lyons III* in support of their contention that Treasury Regulation § 1.411(a)-11 is unsustainable after the effective date of the Retirement Protection Act of 1994 insofar as it purports to require the calculation of *consensual* lump sum payments using Code section 417(e)(3) discount rates. At

oral argument on December 17, 2003, plaintiff's counsel suggested that the District Court in *Lyons III* is reconsidering its decision with respect to that issue in light of the Seventh Circuit's decision in *Berger v. Xerox Corp. Ret. Income Guar. Plan*.

Defendants respectfully submit that plaintiff's counsel is mistaken. On December 22, 2003, defense counsel Robert Wick spoke to Mr. Greg Braden, lead counsel for the defendants in *Lyons III*. Mr. Braden stated that there has been no request for reconsideration of the decision in *Lyons III* with respect to either the Treasury Regulation or the District Court's conclusion that the *Lyons* plaintiffs' whipsaw claim fails as a matter of law for employees who received their lump sum distributions after the effective date of the 1994 Act. Mr. Braden also stated that no further decision from the *Lyons III* court is expected on these issues. According to Mr. Braden, the questions on which a further decision is expected relate to a pre-retirement mortality issue and a discount rate issue, both of which relate solely to the plaintiffs who received lump sum distributions *before* the effective date of the 1994 Act.

Defendants also submit herewith (i) the excerpt from the Brief of Appellees in *Xerox* that was provided to the Court and opposing counsel at oral argument, and (ii) an article provided to the Court and opposing counsel at oral argument describing the cash balance plan of a major employer that provides participants with interest credits at a rate equal to the rate of return experienced by various mutual funds. The article relates to the argument made at pp. 32-33 of defendants' opening summary judgment memorandum.

Respectfully submitted,

/s Michael A. Roberts
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Attorneys for Defendants

December __, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Notice of Supplemental Authority and Update on Status of Lyons III Decision has been served by U.S. Mail, postage prepaid on Allen C. Engerman, Law Offices of Allen C. Engerman. P.C., 666 Dundee Road, No. 1200, Northbrook, IL 60062, and Thomas R. Theado, Gary, Naegele, & Theado, 446 Broadway Avenue, Lorain, OH 44052-1797, counsel for the plaintiff, on this 29th day of December, 2003.

/s Michael A. Roberts